APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 02-60608

SUSIE ROSS; DENITA JOHNSON; JAMES CURTIS; LARRY PICKENS; DORIS KING; KAREN WHITLEY; RUBY MAGEE; ROY ALLEN, JR.; CHESTER NEWMAN; SHARON WHITE,

Plaintiffs-Appellants,

v.

CITIFINANCIAL, INC., A MARYLAND CORPORATION, FORMERLY KNOWN AS FIRST FAMILY FINANCIAL SERVICES, INC.; CITIFINANCIAL, INC., A MARYLAND CORPORATION, FORMERLY KNOWN AS COMMERCIAL CREDIT OF MISSISSIPPI; CITIFINANCIAL, INC., A TENNESSEE CORPORATION, FORMERLY KNOWN AS COMMERCIAL CREDIT OF MISSISSIPPI; CITIFINANCIAL SERVICES, INC., A GEORGIA CORPORATION; UNION SECURITY LIFE INSURANCE COMPANY; AMERICAN SECURITY INSURANCE COMPANY; TRACY MITCHELL; DARLA FARMER; JOE SMITH,

Defendants-Appellees.

DENISE HOWARD; LENA CHAMBERS; PRISCILLA CHALMERS; BETTY WHITLEY; FAYE DENISE LOGAN; CAROL BUSECK; KELVIN JOHNSON; PHILLIP GORDON; DEBBIE GORDON; ALISHA F. WILSON; MARGARET HAYMON; WANDA ALLEN; MONROE HOGGATT; EUGENE HAYMON; EVA PARKER HALL,

Plaintiffs-Appellants,

v.

CITIFINANCIAL, INC., A MARYLAND CORPORATION, FORMERLY KNOWN AS FIRST FAMILY FINANCIAL SERVICES, INC.; CITIFINANCIAL, INC., A MARYLAND CORPORATION, FORMERLY KNOWN AS COMMERCIAL CREDIT OF MISSISSIPPI; CITIFINANCIAL, INC., A TENNESSEE CORPORATION, FORMERLY KNOWN AS COMMERCIAL CREDIT OF MISSISSIPPI; CITIFINANCIAL SERVICES, INC., A GEORGIA CORPORATION; UNION SECURITY LIFE INSURANCE COMPANY; AMERICAN SECURITY INSURANCE COMPANY; TRACY MITCHELL; DARLA FARMER; JOE SMITH; JOHN DOES 1-50; VALERIE STEVENS,

Defendants-Appellees.

August 29, 2003

Before SMITH, WIENER, and BARKSDALE, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

For these consolidated 28 U.S.C. § 1292(b) interlocutory appeals from remand-denials where diversity-jurisdiction removal was based on fraudulent joinder, at issue is whether there is *arguably a reasonable basis* for predicting the non-diverse defendants could be liable under Mississippi law and, therefore, *not* fraudulently joined. AFFIRMED; REMANDED.

I.

Plaintiffs, all Mississippi residents, entered into loan agreements with Citifinancial or its predecessors. In conjunction with those loans, Plaintiffs purchased insurance,

such as credit life and property, through Union Security Life Insurance Company and American Security Insurance Company.

Plaintiffs filed actions in Mississippi state court. In addition to suing Citifinancial, American Security, and Union Security (non-resident corporations), Plaintiffs sued Citifinancial employees, who were licensed insurance agents and Mississippi residents (collectively: Individual Defendants). Plaintiffs alleged: their insurance premiums were excessive compared to market rates; they were inflated by commissions; and their loan interest and principal were increased by including the insurance polices within the loan amounts or unnecessarily refinancing the loans. Plaintiffs claimed breach of fiduciary duty, breach of implied covenants of good faith and fair dealing, fraudulent and negligent misrepresentation and omission, civil conspiracy, negligence, and unconscionability under Mississippi law.

Along this line, where Defendants submitted evidence of Plaintiffs' loan documents, they contained signed separate disclosure statements or signed provisions on the note or security agreements, making clear that insurance was *not* required. These statements included: "CREDIT LIFE OR CREDIT DISABILITY INSURANCE IS NOT REQUIRED TO OBTAIN THIS LOAN"; and "Credit Life and Credit Disability Insurance are NOT REQUIRED in connection with this loan and were not a factor in the approval of this extension of credit. If you chose to obtain life insurance through Lender . . . the cost thereof is shown . . . herein and is included in the Amount Financed". Each of the remaining Plaintiffs has at least a high school education except for one, who has a ninth grade education.

In 2001, Defendants removed the actions to federal

court under 28 U.S.C. § 1441, claiming diversity jurisdiction pursuant to 28 U.S.C. § 1332. To that end, Defendants claimed Individual Defendants were fraudulently joined.

The district court denied Plaintiffs' remand motions, reasoning: Individual Defendants were fraudulently joined; therefore, jurisdiction was valid under § 1332. It held most of Plaintiffs' claims time-barred under Mississippi's general three-year statute of limitations, Miss. Code. Ann. § 15-1-49(1). For Plaintiffs' remaining claims, it concluded there was *no reasonable basis* for predicting Individual Defendants could be liable. *Howard v. CitiFinancial*, 195 F. Supp. 2d 811 (S.D. Miss. 2002); *Ross v. CitiFinancial*, No. 5:01-CV-185BN, 2002 WL 461567 (S.D. Miss. 2002). (A number of Plaintiffs had been voluntarily dismissed or did not assert claims against Individual Defendants.)

II.

The interlocutory appeal for each action presents four issues: (1) whether the district court applied the correct standard in holding non-diverse defendants were fraudulently joined; (2) whether, under Mississippi law, an affirmative act is required to toll the statute of limitations for the claims at issue; (3) whether a party may justifiably rely on an oral representation contrary to the terms of a written contract; and (4) whether a fiduciary relationship arises in first party insurance contracts such as those at issue.

A.

Fraudulent joinder is established by showing: (1) actual fraud in pleading jurisdictional facts; or (2) inability of the plaintiff to establish a cause of action against the non-diverse defendant. *Travis v. Irby*, 326 F.3d 644, 647 (5th Cir. 2003)

(citing *Griggs v. State Farm Lloyds*, 181 F.3d 694, 699 (5th Cir. 1999)). At issue is the standard to be applied for the second of the two means for showing fraudulent joinder.

The district court noted that the removing party has the burden of showing fraudulent joinder, but that Plaintiffs could not rest upon mere allegations in their pleadings. Rather, the court could pierce the pleadings. It concluded: "In the event the court, after resolving all disputed questions of fact and ambiguities of law in favor of the non-removing party, finds that there is '*arguably a reasonable basis* for predicting that the state law *might* impose liability on the facts involved, then there is *no* fraudulent joinder' and hence *no* basis for asserting diversity of citizenship jurisdiction". *Howard*, 195 F. Supp. 2d at 818 (emphasis added) (citing *Jernigan v. Ashland Oil, Inc.*, 989 F.2d 812, 815 (5th Cir.), *cert. denied*, 510 U.S. 868, 114 S. Ct. 192, 126 L. Ed. 2d 150 (1993)); *Ross*, slip op. at 8 (same).

Later, however, the district court stated: "The issue before the Court is whether there is a *possibility* that liability could be imposed on the non-diverse Defendants/agents based on the facts of the case". *Howard*, 195 F. Supp. 2d at 819 (emphasis added); *Ross*, slip op. at 9 (same). The court concluded: because Plaintiffs could not prevail on any of their claims against Individual Defendants, they were fraudulently joined. *Howard*, 195 F. Supp. 2d at 826-27; *Ross*, slip op. at 35.

Plaintiffs assert that the "reasonable basis" standard is not correct; that, instead, the standard is whether "there is no possibility that plaintiff [could] establish a cause of action". *Burchett v. Cargill, Inc.*, 48 F.3d 173, 176 (5th Cir. 1995). Plaintiffs also claim the district court shifted the burden of proof and did not construe all factual disputes in their favor.

They contend Defendants only refuted their allegations with allegations, and as such, Plaintiffs were not required to provide evidence to refute them – that it is only after Defendants provide evidence refuting Plaintiffs' allegations that Plaintiffs must provide evidence.

Our opinions have described the fraudulent joinder standard in various ways. Recent opinions, however, have clarified that standard. "Any argument that a gap exists between the 'no possibility' and 'reasonable basis' of recovery language was recently narrowed, if not closed". *Travis*, 326 F.3d at 648. The court must determine whether there is arguably a reasonable basis for predicting that state law might impose liability. *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir. 2002). This means that there must be a *reasonable* possibility of recovery, not merely a *theoretical* one. *Id.*; *Badon v. RJR Nabisco, Inc.*, 236 F.3d 282, 286 n. 4 (5th Cir. 2000) (rejecting contention that theoretical possibility of recovery is enough to support no fraudulent joinder, citing "reasonable basis" standard); *Griggs*, 181 F.3d at 701 ("While the burden of demonstrating fraudulent joinder is a heavy one, we have never held that a particular plaintiff might possibly establish liability by the mere hypothetical possibility that such an action could exist".).

Nonetheless, the burden of persuasion on those claiming fraudulent joinder remains a heavy one. *Travis*, 326 F.3d at 648. Along these lines, our court has recognized the similarity between standards for Federal Rule of Civil Procedure 12(b)(6) (failure to state claim) and fraudulent joinder. *Id. See Great Plains Trust*, 313 F.3d at 312. The scope of the inquiry for fraudulent joinder, however, is broader than that for Rule 12(b)(6).

For fraudulent joinder *vel non*, it is well established that

the district court may "pierce the pleadings" and consider summary judgment-type evidence. *Travis*, 326 F.3d at 648-49 (citing *Carriere v. Sears, Roebuck and Co.*, 893 F.2d 98, 100 (5th Cir.), *cert. denied*, 498 U.S. 817, 111 S. Ct. 60, 112 L. Ed. 2d 35 (1990)). In conducting this inquiry, the district court "must also take into account all unchallenged factual allegations, including those alleged in the complaint, in the light most favorable to the plaintiff". *Travis*, 326 F.3d at 649. In addition, the court must resolve all ambiguities of state law in favor of the non-removing party. *Id.*

The district court properly applied these standards. It cited the "reasonable basis" standard; and, although it also discussed the "possibility" of recovery, it never looked for a "mere theoretical possibility of recovery". It also correctly noted that it could "pierce the pleadings", but that it must construe all disputed questions of fact and ambiguities of law in Plaintiffs' favor. Contrary to Plaintiffs' assertion, it did not shift the burden to them upon Defendants' asserting contrary allegations. Finally, it construed all allegations and evidence in Plaintiffs' favor.

B.

The district court ruled that most of Plaintiffs' claims were time-barred; their claims had not been fraudulently concealed; and, had they been, the time for bringing an action would be tolled. In this regard, the court applied Mississippi's general three-year statute of limitations, Miss. Code Ann. § 15-1-49(1) ("All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after"). *E.g., Stephens v. Equitable Life Assurance Society of the United States*, 850 So. 2d 78, 81 (Miss. 2003) (applying statute to claim of fraud and misrepresentation of sale

of insurance).

Claims asserted three years after their accrual may be actionable *if* they were fraudulently concealed and Plaintiffs could not discover them with reasonable diligence. In that event, the limitations period begins to run when the claims are discovered.

> If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered.

Miss. Code. Ann. § 15-1-67. Along this line, *Robinson v. Cobb*, 763 So. 2d 883 (Miss. 2000), provides that, in order to toll the limitations period, Plaintiffs must prove: "[Defendant] engaged in *affirmative acts of concealment*"; and "though [Plaintiffs] acted with due diligence in attempting to discover [the claim], they were unable to do so". *Id.* at 887 (emphasis added; internal quotation and citation omitted).

Nevertheless, Plaintiffs contend the district court erred by requiring them to prove an affirmative act of concealment and assert that, in cases of fraud, no subsequent act of concealment is necessary. Defendants counter that, although the Mississippi Supreme Court has not ruled on this issue in the context of credit insurance sales, it has established that a subsequent affirmative act of fraudulent concealment is necessary to toll limitations where the underlying claim is for fraud. Otherwise, the limitations begin to run when Plaintiffs receive documents which, if read, would lead to discovery of the claim.

Mississippi law is unambiguous: Plaintiffs must prove a subsequent affirmative act of fraudulent concealment to toll the limitations. *Stephens*, 850 So. 2d 78, held that the fraudulent concealment doctrine applied to a fraud claim. There, plaintiffs alleged defendants misrepresented that a life insurance contract had vanishing premiums. The court stated that fraudulent concealment was required to toll the limitations period; and, because the terms were written in the policies, plaintiffs could not show such concealment.

Further, in *Reich v. Jesco, Inc.*, 526 So. 2d 550 (Miss.1988), plaintiff's structure collapsed 12 years after construction. Plaintiff sued the builder for negligence, strict liability, and breach of warranty. He claimed the limitations period was tolled because the faulty construction was not evident until after the collapse. In holding the limitations period was *not* tolled, the Mississippi Supreme Court cited two prior opinions: *Dunn v. Dent*, 169 Miss. 574, 153 So. 798 (1934); and *Lundy v. Hazlett*, 147 Miss. 808, 112 So. 591 (1927).

In each, defendant falsely represented that land conveyed to plaintiff was larger than it was. Limitations were tolled in *Lundy*, but not in *Dunn*. In *Reich*, the court distinguished these cases by noting that, in *Lundy*, defendants made "express, fraudulent representation[s] . . . calculated to conceal . . . after completion of the sale", *Reich*, 526 So. 2d at 552 (internal quotation omitted); in *Dunn*, plaintiffs failed to show defendant "did anything that could be construed as a concealment of the falsity of the representation", *id.* (internal quotation omitted).

As stated, Mississippi law is unambiguous. Pursuant to § 15-1-67, Plaintiffs were required to prove an affirmative act of fraudulent concealment post-completion of the insurance

sales in order to toll the statute of limitations.

C.

The district court held that, under Mississippi law, a plaintiff has a duty to read a contract before signing it and cannot reasonably rely on oral misrepresentations regarding its terms. Accordingly, it held both that the statute of limitations was not tolled because Plaintiffs' claim was not fraudulently concealed and that Plaintiffs did not state valid substantive claims of fraudulent or negligent misrepresentation.

Plaintiffs maintain that, under Mississippi law, the rule that a party must read a contract before signing it does not apply if the party was induced by fraud or false representations in entering into that contract. Defendants counter that, as a general rule, Mississippi imputes knowledge of a contract to the signatory, and a contracting party cannot reasonably rely on oral representations that conflict with its written terms. Defendants accept that the Mississippi Supreme Court has created a limited exception for cases of *fraud in factum*, that is, where the character of the document is misrepresented. Defendants assert that the exception does not apply here, because Plaintiffs claim *fraud in inducement*, that is misrepresentations about the terms of the contract.

"[A] party is under an obligation to read a contract before signing it, and *will not as a general rule be heard to complain of an oral misrepresentation the error of which would have been disclosed by reading the contract*". *Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co., Inc.*, 584 So. 2d 1254, 1257 (Miss. 1991) (emphasis added). *See Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 726 (Miss. 2002) ("In Mississippi, a person is charged with knowing the contents of any document that he

executes".); *Cherry v. Anthony, Gibbs & Sage*, 501 So. 2d 416, 419 (Miss. 1987) (in the context of an insurance policy, knowledge of contract terms is "imputed to [the contracting party] as a matter of law").

Stephens, 850 So. 2d 78, is highly persuasive authority that the Mississippi Supreme Court would bar Plaintiffs' claims. There, plaintiffs sued an insurer and their agent, Bell, claiming Bell had fraudulently represented that the life insurance policies they had purchased had vanishing premiums. They brought their claims after the limitations period, but asserted it was tolled because of fraudulent concealment. Significantly, *Stephens* cited *Godfrey, Bassett & Kuykendall* for the following proposition:

> [I]nsureds are bound as a matter of law by the knowledge of the contents of a contract in which they entered notwithstanding whether they actually read the policy. Any alleged oral agreement in this case does not have any effect on the written insurance contract.

850 So. 2d at 82 (internal citation omitted). The court concluded plaintiffs could not show fraudulent concealment because the terms of the insurance contract unambiguously stated that premiums did not vanish. *Stephens* and the actions at hand are indistinguishable.

The Mississippi Supreme Court appears to apply two exceptions to the rule that knowledge of written terms is imputed to contract signatories: fraud in factum and equitable relief. Neither exception applies here.

First, fraud in factum

is defined as "[m]isrepresentation as to the nature of a

> writing that a person signs with neither knowledge nor reasonable opportunity to obtain knowledge of its character or essential terms." BLACK'S LAW DICTIONARY 661 (6th ed. 1990). Fraud in the inducement, which is broader, is defined as "[f]raud connected with [the] underlying transaction and not with the nature of the contract or document signed. Misrepresentation as to the terms, quality or other aspects of a contractual relation, venture or other transaction that leads a person to agree to enter into the transaction with a false impression or understanding of the risks, duties or obligations she has undertaken." *Id.*

FDIC v. Firemen's Ins. Co., 109 F.3d 1084, 1089 n.1 (5th Cir. 1997). Tracking the definition of fraud in factum, the Mississippi Supreme Court has applied an exception to the imputed knowledge rule:

> If a person is ignorant of the contents of a written instrument and signs it under mistaken belief, induced by misrepresentation, that it is an instrument *of a different character*, without negligence on his part, the agreement is void.

Johnson v. Brewer, 427 So. 2d 118, 123 (Miss. 1983) (emphasis added).

Although it used the word "induced", it is clear from this language that the Mississippi Supreme Court is discussing fraud in factum. Here, this exception cannot apply because Plaintiffs do not claim they misapprehended the character of the documents.

Second, *Godfrey, Bassett & Kuykendall* provides an exception for equitable relief: "[F]ailure to read a contract

before signing it, although it may constitute negligence, will not bar equitable relief to one who has executed a contract in reliance upon false representations made to him by the other contracting party". 584 So. 2d at 1259. *See Turner v. Terry*, 799 So. 2d 25, 36 (Miss. 2001) (citing *Godfrey* rule, but not applying because plaintiffs failed to prove fraud).

This exception does not apply because Plaintiffs are not seeking equitable relief. They seek damages. In any event, the facts are distinguishable. There, a construction contractor failed to read a contract into which he entered with the construction site owner. The contract was drafted by a third-party architect. Before bidding on the project, the contractor contacted the architect to inquire whether the contract included a $9,000 contingency term that had to be included in the bid. The architect said it did not. Inadvertently, the term was left in the contract the contractor signed, and the owner refused to pay the contractor $9,000. The contractor sued the third-party architect for restitution based on misrepresentation. Here, Plaintiffs are suing the signatories and drafters of the contracts.

D.

For the final issue, the district court ruled that, as a matter of law, no fiduciary relationship existed between Individual Defendants (insurance agents) and Plaintiffs. Plaintiffs contend the district court erred because, *at least arguably*, a fiduciary relationship could have existed. They primarily claim that Mississippi case law has previously held a fiduciary relationship exists between an insurance agent and an insured, by virtue of their relationship. Further, they claim that, even if that is not the case, the facts indicate Plaintiffs trusted the agents, which brought about such a relationship.

"Under Mississippi law, there is no fiduciary

relationship or duty between an insurance company and its insured in a first party insurance contract." *Langston v. Bigelow*, 820 So. 2d 752, 756 (Miss. Ct. App. 2002) (quoting *Gorman v. Southeastern Fidelity Ins. Co.*, 621 F. Supp. 33, 38 (S.D. Miss. 1985)). *See also General Motors Acceptance Corp. v. Baymon*, 732 So. 2d 262, 270 (Miss. 1999) ("[T]he general rule is that there is no presumption of a fiduciary relationship between a debtor and creditor." (alteration in original; quotation omitted)). "In Mississippi, the purchase of insurance is deemed to be an arms' length transaction." *Langston*, 820 So. 2d at 756.

Langston rejected claims like those asserted here:

> [Plaintiff] claims that the trust and dependence with regard to insurance is inherent in the very nature of the contract, thus creating the special fiduciary relationship . . . . We find, though, that [Plaintiff] is mistaken in his belief that this mere contractual obligation on the part of the insurer to pay a claim creates any special trust or fiduciary relationship.

Id. at 756-57.

A fiduciary duty may exist to *procure* insurance, if a bank sells credit insurance. *First United Bank of Poplarville v. Reid*, 612 So. 2d 1131 (Miss. 1992), considered whether a fiduciary duty arose when a bank employee agreed to purchase credit life insurance for a loan applicant. The court concluded that the bank became an insurance agent with a duty to procure insurance. Nonetheless, because the certificate of insurance showed its terms on its face, the bank did not have a duty to disclose any terms, even though the loan applicants had not read the policy.

Although Plaintiffs point to affidavits in which some Plaintiffs state they trusted and relied on Individual Defendants, none of this evidence shows circumstances *justifying* such reliance. Plaintiffs do not claim Defendants failed to procure insurance; moreover, they do not claim Defendants violated the written terms of the insurance contract or created a hidden scheme to defraud them. *Cf. American Bankers Ins. Co. of Florida v. Alexander*, 818 So. 2d 1073 (Miss. 2001) (fiduciary duty between bank, credit insurance company, and lendee arose where claim of "hidden scheme" between bank and insurance company increasing insurance rates); *Lowery v. Guaranty Bank & Trust Co.*, 592 So. 2d 79 (Miss. 1991) (fiduciary duty arose between bank and lendee/insured where long history of dealings with bank aside from the note).

III.

For the foregoing reasons, because there is not arguably a reasonable basis for predicting Individual Defendants could be liable under Mississippi law, the remand-denials are AFFIRMED and these cases are REMANDED for further proceedings consistent with this opinion.

AFFIRMED; REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT,
S.D. MISSISSIPPI, WESTERN DIVISION

No. CIV.A.5:01-CV-185BN

SUSIE ROSS, DENITA JOHNSON, JAMES E. CURTIS, LARRY PICKENS, DORIS KING, KAREN WHITLEY, RUBY MAGEE, ROY ALLEN, JR., CHESTER NEWMAN, AND SHARON WHITE,

Plaintiffs,

v.

CITIFINANCIAL, INC., F/K/A FIRST FAMILY FINANCIAL SERVICES, INC., CITIFINANCIAL, INC., F/K/A COMMERCIAL CREDIT OF MISSISSIPPI, INC., CITIFINANCIAL, INC., F/K/A FIRST FAMILY FINANCIAL SERVICES, INC., CITIFINANCIAL, INC., F/K/A COMMERCIAL CREDIT OF MISSISSIPPI, INC., CITIFINANCIAL SERVICES, INC., UNION SECURITY LIFE INSURANCE COMPANY, AMERICAN SECURITY INSURANCE COMPANY, TRACY MITCHELL, DARLA FARMER, JOE SMITH, AND JOHN DOES 1-50,

Defendants.

March 18, 2002

OPINION AND ORDER

Barbour, District Judge.

This cause is before the Court on the Motion of Plaintiffs for Remand. Having considered the Motion, Response, Rebuttal, attachments to each and supporting and opposing authority, the Court finds that the Motion is not well taken and should be denied.

I. Background and Procedural History

Plaintiffs all entered loan agreements with either Defendants CitiFinancial, Inc., f/k/a First Family Financial Services, Inc., Defendants CitiFinancial, Inc., f/k/a Commercial Credit of Mississippi, Inc., or CitiFinancial Services, Inc. (collectively "CitiFinancial").[1] In conjunction with the loans, Plaintiffs purchased various insurance policies through Defendants Union Security Life Insurance Company ("Union Security") and/or American Security Insurance Company ("American Security") (collectively "Insurance Defendants").

On May 7, 2001, Plaintiffs filed a complaint in the Circuit Court of Holmes County, Mississippi, against CitiFinancial, the Insurance Defendants, Tracy Mitchell ("Mitchell"), Darla Farmer ("Farmer") and Joe Smith ("Smith") (collectively "individual Defendants").[2] Plaintiffs allege that, "[c]ontrary to law, the Defendants required collateral protection insurance, credit life insurance, credit accident and health insurance, accidental death and dismemberment insurance, involuntary unemployment insurance, property insurance, and/or other insurance in connection with their loans

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1. Plaintiffs Cora Edney and Ralph King voluntarily dismissed their claims against all Defendants without prejudice on September 20, 2001.

2. Mitchell, Farmer and Smith are or were licensed insurance agents of CitiFinancial.

to Plaintiffs." Complaint, ¶ 26. Plaintiffs also allege that the premiums paid for the allegedly required insurance products were excessive in comparison to similar products on the market, and that they were not offered alternative, and presumably less costly, insurance. Plaintiffs allege that the premiums were inflated because of undisclosed commissions and other remuneration received from the Defendant insurers for selling their policies. Plaintiffs further allege that Defendants engaged in insurance packing, padding, flipping, and churning in violation of Mississippi law. Based on this conduct, Plaintiffs allege claims of breach of fiduciary duty, breach of implied covenants of good faith and fair dealing, fraudulent and negligent misrepresentation and/or omission, civil conspiracy, negligence, and unconscionability under the Uniform Commercial Code of Mississippi ("UCC").

On June 11, 2001, the CitiFinancial Defendants and Insurance Defendants removed the lawsuit to this Court pursuant to 28 U.S.C. § 1441 on the basis of diversity of citizenship jurisdiction under 28 U.S.C. § 1332.[3] For the purpose of diversity analysis, Plaintiffs are all citizens of Mississippi. Defendant CitiFinancial, Inc., f/k/a First Family Financial Services, Inc., and Commercial Credit of Mississippi, Inc., are Maryland corporations with their principal places of

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3. In their Notice of Removal, Defendants "reserve[d] the right to supplement [their] Notice of Removal by adding additional Plaintiffs who may be in bankruptcy or whose claims are property of their bankruptcy estates." Notice of Removal ¶ 14. Defendants filed a supplement to their Notice of Removal on September 4, 2001, adding the bankruptcies of Cora Edney and Ralph Harvey King, Sr., Ernestine King. Defendants filed a second supplement to their Notice of Removal on and September 7, 2001, adding the bankruptcy of Ralph W.E. King. As Cora Edney and Ralph King were voluntarily dismissed, the Court need not decide the propriety of such supplementation, nor consider their bankruptcies for jurisdictional purposes. *See Allen v. City Fin. Co.*, 224 B.R. 347, 353 (S.D. Miss. 1998).

business in Maryland. Defendant CitiFinancial, Inc., f/k/a First Family Financial Services, Inc., and Commercial Credit of Mississippi, Inc., are Tennessee corporations with their principal places of business in Tennessee. Defendant CitiFinancial Services, Inc., is a Georgia corporation with its principal place of business in Georgia. Defendants Union Security and American Security are Delaware corporations with their principal places of business in Georgia. Defendants Mitchell, Farmer, and Smith are citizens of Mississippi. Defendants contend that Plaintiffs have fraudulently joined the non-diverse Defendants to avoid federal jurisdiction and, therefore, the Court may properly assert federal subject matter jurisdiction over this case. Plaintiffs filed the instant Motion to Remand on July 6, 2001.[4]

II. Fraudulent Joinder Standard

Under 28 U.S.C. § 1441(a), "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed . . . to the district court of the United States for the district and division embracing the place where such action is pending." The removing party has the burden of proving that the federal court has jurisdiction to hear the case. *See Jernigan v. Ashland Oil, Inc.*, 989 F.2d 812, 815 (5th Cir. 1993), *cert. denied*, 510 U.S. 868, 114 S. Ct. 192, 126 L. Ed. 2d 150 (1993); *Laughlin v. Prudential Ins. Co.*, 882 F.2d 187, 190 (5th Cir. 1989) (holding that the "removing party bears the burden of establishing federal jurisdiction."). In cases in which the removing party alleges diversity of citizenship jurisdiction on the basis of fraudulent

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4. Plaintiffs amended their Motion to Remand on July 10, 2001, September 7, 2001, and September 17, 2001 to challenge the assertion of Defendants that subject matter jurisdiction existed based on the bankruptcies of Cora Edney and Ralph Edney.

joinder, "it has the burden of proving the fraud." *Laughlin*, 882 F.2d at 190; *Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98, 100 (5th Cir. 1990), *cert. denied* 498 U.S. 817, 111 S. Ct. 60, 112 L. Ed. 2d 35 (1990). To establish fraudulent joinder, the removing party must prove: (1) that there was actual fraud in the plaintiff's pleading of the jurisdictional facts or (2) that the plaintiff has no possibility of establishing a cause of action against the non-diverse defendant in state court. *Griggs v. State Farm Lloyds*, 181 F.3d 694, 699 (5th Cir. 1999) (citations omitted); *Burden v. General Dynamics Corp.*, 60 F.3d 213, 217 (5th Cir. 1995); *Cavallini v. State Farms Mutual Auto Ins. Co.*, 44 F.3d 256, 259 (5th Cir. 1995).

When considering whether a non-diverse defendant has been fraudulently joined to defeat diversity of citizenship jurisdiction, courts should "pierce the pleadings" and consider "summary judgment-type evidence such as affidavits and deposition testimony." *See e.g. Cavallini*, 44 F.3d at 256. *See also LeJeune v. Shell Oil Co.*, 950 F.2d 267, 271 (5th Cir. 1992) (holding that "a removing party's claim of fraudulent joinder to destroy diversity is viewed as similar to a motion for summary judgment . . . . A court is to pierce the pleadings to determine whether, under controlling state law, the non-removing party has a valid claim against the non-diverse parties."). Under this standard, plaintiffs "may not rest upon the mere allegations or denials of [their] pleadings." *Beck v. Texas State Bd. of Dental Examiners*, 204 F.3d 629, 633 (5th Cir. 2000). *See also Badon v. RJR Nabisco, Inc.*, 236 F.3d 282, 286 n.4 (5th Cir. 2001) (finding that the "mere theoretical possibility of recovery under local law" does not preclude removal. Plaintiffs must show that there exists "a reasonable basis for predicting that state law would allow recovery in order to preclude a finding of fraudulent joinder."). Further, conclusory or generic allegations of wrongdoing on the part of the non-diverse defendant are not sufficient to show that that

defendant was not fraudulently joined. *See Badon v. RJR Nabisco, Inc.*, 224 F.3d 382, 392-93 (5th Cir. 2000); *Peters v. Metropolitan Life Ins. Co.*, 164 F. Supp. 2d 830, 834 (S.D. Miss. 2001) (J. Bramlette) (holding that the allegations against non-diverse defendants "must be factual, not conclusory, because conclusory allegations do not state a claim."). Therefore, when responding to a charge of fraudulent joinder, a plaintiff must allege specific acts of wrongdoing on the part of the non-diverse defendant in the complaint and submit evidence to support those claims. *See Badon*, 224 F.3d at 390 (holding that removal is not precluded merely because the state court complaint, on its face, sets forth a state law claim against a non-diverse defendant. Removal is proper "if the plaintiff's pleading is pierced and it is shown that as a matter of law there is no reasonable basis for predicting that the plaintiff might establish liability on that claim against the instate defendant.").

When conducting a fraudulent joinder analysis, a court must resolve all disputed questions of fact and ambiguities of law in favor of the non-removing party, *see Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir. 1992), but "only when there exists an actual controversy, i.e. when both parties have submitted evidence of contradictory facts." *Badon*, 224 F.3d at 394. A court should not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts" to support his claims against the non-diverse defendant. *Id.* (citing *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)) (alteration in original). In the event the court, after resolving all disputed questions of fact and ambiguities of law in favor of the non-removing party, finds that there is "arguably a reasonable basis for predicting that the state law might impose liability on the facts involved, then there is no fraudulent joinder" and hence no basis for asserting diversity of citizenship

jurisdiction. *Jernigan*, 989 F.2d at 816.

III. Analysis

As a preliminary matter, the Court considers Plaintiffs argument that the removal was untimely. Plaintiffs argue that Defendants were served with process on May 11, 2001 and that the 30 day time limit for removal under section 1446(b) expired on June 10, 2001. Plaintiffs argue that, because Defendants filed their Notice of Removal on June 11, 2001, the removal is untimely and this action must be remanded. The Court does not agree. While the thirtieth day was, indeed, June 10, 2001, Rule 6(a) of the Federal Rules of Civil Procedure provides in pertinent part, "The last day of the [time] period . . . shall be included, unless it is a Saturday, a Sunday, or a legal holiday . . . in which event the period runs until the end of the next day which is not one of the aforementioned days." As June 10, 2001, was a Sunday, the 30 day removal period ran until the end of Monday, June 11, 2001. The Court therefore finds that the removal was timely and that the Motion to Remand on this ground is not well taken and should be denied.

Plaintiffs allege that as agents of CitiFinancial, Mitchell, Farmer, and Smith may be held liable on the claims alleged in the Complaint. Under Mississippi law, an agent can incur independent liability if he engages in conduct which rises to the level of gross negligence, malice or reckless disregard for the rights of the plaintiff. *See Bass v. California Life Ins. Co.*, 581 So. 2d 1087, 1090 (Miss. 1991). The issue before the Court is whether there is a possibility that liability could be imposed on the non-diverse Defendants/agents based on the facts of the case.

A. Are Plaintiffs' Claims Time Barred?

The record shows that only Plaintiffs Susie Ross ("Ross"), Karen Whitley ("Whitley"), Doris King ("King"), Ruby Magee ("Magee"), Roy Allen, Jr. ("Allen"), Chester Newman ("Newman"), and Sharon White ("White") assert claims against the individual Defendants.[5] Defendants argue that Plaintiffs' claims are governed by the general, three year statute of limitations found at Miss. Code Ann. § 15-1-49(1). Defendants also argue that statute of limitations began to run on Plaintiffs' claims on the date each Plaintiff took out their loans with Defendants. *See* Memorandum of Insurance Defendants in Opposition to Motion to Remand. That is, no general discovery rule tolled the statute as to Plaintiffs' claims.

Plaintiffs allege that they "were unaware of the Defendants' wrongful conduct . . . and could not have at any time earlier [than the filing of their Complaint] discovered Defendants' wrongful conduct, which included Defendants' affirmative and fraudulent concealment of their wrongful conduct . . . ." Complaint ¶ 28. Thus, Plaintiffs argue that the statute of limitation was tolled by the alleged fraudulent concealment of Defendants of their allegedly wrongful conduct. The Court finds that, as there are no periods of limitation prescribed by statute for the causes of action asserted by Plaintiffs, the general, three year statute of limitations is applicable to all of Plaintiffs' claims. The Court further finds that the general statute of limitations may be tolled pursuant to

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5. As previously noted, Plaintiffs Cora Edney and Ralph King have been voluntarily dismissed from this action. Plaintiffs James Curtis, Denita Johnson, and Larry Pickens stated in response to Interrogatory 4 propounded by the Insurance Defendants that they have no claims against the individual Defendants. *See* Response, Exhibit "C."

Miss. Code Ann. § 15-1-67 (providing, "If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered"). Accordingly, the Court finds that, unless tolled by section 15-1-67, Plaintiffs' claims that accrued before May 7, 1998, are time barred. In order to determine whether the statute of limitations was tolled as Plaintiffs contend, the Court must consider each of Plaintiffs' loans with CitiFinancial, the insurance policies associated with each loan, the disclosures made by CitiFinancial with regard to each loan, and any affirmative acts whereby Defendants fraudulently concealed Plaintiffs' claims.

1. Plaintiff Allen's Loans with CitiFinancial

Plaintiff Allen took out loans with CitiFinancial on the following dates: February 22, 1995, October 12, 1995, March 21, 1996, April 29, 1998, and July 22, 1999. *See* Exhibit "A1." None of the Defendants argue that Allen's claims as to his July 22, 1999, loan with CitiFinancial are barred by the statute of limitations. However, with each of his loans with CitiFinancial, including the July 22, 1999, loan with CitiFinancial, Allen signed disclosure statements and/or retail installment contract and security agreements containing one or more of the following clearly marked provisions:

> • "Insurance: Credit life insurance is not required to obtain credit and will not be provided unless you sign and agree to pay the additional cost;"
>
> • "Credit Life and Disability Insurance are NOT REQUIRED in connection with this loan and were not

a factor in the approval of this extension of credit. If you chose to obtain life insurance through Lender . . . the cost thereof is shown . . . herein and is included in the Amount Financed;"

• "CREDIT LIFE OR CREDIT DISABILITY INSURANCE IS NOT REQUIRED TO OBTAIN THIS LOAN;"

• "I/WE HAVE READ THIS NOTICE AND HAVE MADE THE CHOICE ABOVE BEFORE SIGNING ANY NOTE OR OTHER PAPER REPRESENTING A LOAN."

See id. It is well settled under Mississippi law that a contracting party is under a legal obligation to read a contract before signing it. *See Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co., Inc.*, 584 So. 2d 1254, 1257. *See also Koenig v. Calcote*, 199 Miss. 435, 25 So. 2d 763 (Miss. 1946); *McCubbins v. Morgan*, 199 Miss. 153, 23 So. 2d 926 (Miss. 1945). Moreover, knowledge of the contents of a contract will be imputed to a contract party even though he did not read the contract before signing it. *See Cherry v. Anthony, Gibbs, Sage*, 501 So. 2d 416, 419 (Miss. 1987). Where, as here, the terms of a contract are made available to a contracting party, any reliance on alleged misrepresentations of those terms is, as a matter of law, unreasonable. *See Carter v. Union Security Life Ins. Co.*, 148 F. Supp. 2d 734 (S.D. Miss. 2001) (Lee, J.). The Court finds that no exception to the above stated rules is applicable to the case sub judice. Therefore, the Court finds that any claims Allen had as to his February 22, 1995, October 12, 1995, March 21, 1996, and April 29, 1998, loans with CitiFinancial are barred by the statute of limitations.

2. Plaintiff Whitley's Loans with CitiFinancial

Plaintiff Whitley took out loans with CitiFinancial on the following dates: August 21, 1996, April 28, 1997, May 30, 1997, November 13, 1997, February 6, 1998, April 24, 1998, September 11, 1998, May 10, 2000, and September 11, 2000. *See* Response, Exhibit "A7." None of the Defendants argue that Whitley's claims as to her September 11, 1998, May 10, 2000, and September 11, 2000, loans with CitiFinancial are barred by the statute of limitations. With regard to the April 24, 1998, loan with CitiFinancial, Whitley did not purchase insurance. It is unclear whether Whitley purchased insurance with the August 21, 1996, November 13, 1997, and May 10, 2000, loans. Whitley purchased insurance with the loans of April 28, 1997, May 30, 1997, February 6, 1998, September 11, 1998, and September 11, 2000, and, as part of the loan transaction, signed disclosure statements or combined note and security agreements containing one or more of the following provisions:

> "Credit Life and Disability Insurance are NOT REQUIRED in connection with this loan and were not a factor in the approval of this extension of credit. If you chose to obtain life insurance through Lender . . . the cost thereof is shown . . . herein and is included in the Amount Financed;"
>
> "CREDIT LIFE OR CREDIT DISABILITY INSURANCE IS NOT REQUIRED TO OBTAIN THIS LOAN;"
>
> "I/WE HAVE READ THIS NOTICE AND HAVE MADE THE CHOICE ABOVE BEFORE SIGNING ANY NOTE OR OTHER PAPER REPRESENTING A LOAN;"

> "NOTE: NON-COMPULSORY INSURANCE VOLUNTARILY PURCHASED BY DEBTOR. I hereby declare that the purchase of the above insurance is entirely voluntary and has not been made compulsory by the creditor and that the creditor has in no way led me to believe that such insurance is a prerequisite to the extending of credit to me. I further declare that the option has been extended to me to purchase this insurance from any insurer or agent of my own choice. I freely choose the insurer and agent to whom the authorization is given."

See id. Whitley also initialed the following provisions of the "Customer Satisfaction Checklist," as part of her September 11, 1998, loan:

> "During the loan closing, my loan representative explained all of my loan documents and loan terms to my satisfaction."

> "I received copies of all of my loan documents. My loan representative answered all of my questions. The benefits of optional insurance have been explained to my satisfaction."

See id. For the reasons stated in section III.A.1. above, the Court finds that any claims Whitley had as to her April 28, 1997, May 30, 1997, and February 6, 1998, loans with CitiFinancial are barred by the statute of limitations.

As for the CitiFinancial loans of August 21, 1996, and November 13, 1997, for which it is unclear whether Whitley purchased insurance, the Court finds that, for the reasons that follow, Whitley has not established a claim of fraudulent concealment and that the statute of limitations was not tolled as

to her claims against Defendants. To establish a claim of fraudulent concealment under section 15-1-67, the Plaintiffs must (1) show "some act of an affirmative nature designed to prevent and which does prevent discovery of the claim," and (2) prove that "even though they acted with due diligence in attempting to discover [the claim], they were unable to do so." *Robinson v. Cobb*, 763 So. 2d 883, 887 (Miss. 2000).

Whitley has not presented any evidence of affirmative acts by Defendants relating to any of these loans that prevented her from discovering her claims against them. The Court therefore finds that Whitley has not established a claim of fraudulent concealment and that the statute of limitations was not tolled as to her claims against Defendants. Accordingly, the Court finds that any claims Whitley had as to her August 21, 1996, and November 13, 1997, loans with CitiFinancial are barred by the statute of limitations.

3. Plaintiff Doris King's Loans with CitiFinancial

Plaintiff King took out a loan with CitiFinancial on January 5, 1998. *See* Rebuttal, Exhibit "14," Affidavit of King. King avers that, at the urging of the individual Defendants, she refinanced her loan with CitiFinancial on August 15, 1998. *See id.* None of the Defendants argue that King's claims as to her August 15, 1998, loan with CitiFinancial are barred by the statute of limitations. However, King also avers that, in order to obtain the January 5, 1998, loan, she was required to purchase credit life and disability insurance, and property insurance. *See id.* Defendants did not submit any documentation with regard to either King's January 5, 1998, or August 15, 1998, loans with CitiFinancial, or any evidence that her loans contained disclosures disclaiming the need to purchase credit life or disability insurance in order to obtain a loan.

As evidence of an affirmative act by the individual Defendants designed to conceal her cause of action, King testified that she did not receive a copy of her January 5, 1998, loan documents at the time of the closing, and that, while she was told by the individual Defendants that they would mail her a copy of her written contract, she never received it. *See* Rebuttal, Exhibit "4," at 25- 26. However, King has not presented any evidence that she acted with due diligence in attempting to discover her cause of action. Without a showing of both an affirmative act of concealment on the part of the individual Defendants, and due diligence on her own part, the Court cannot find that the statute of limitations was tolled as to her January 5, 1998, loan with CitiFinancial. *See Robinson*, 763 So. 2d at 887. Accordingly, the Court finds that any claims King had as to her January 5, 1998, loan with CitiFinancial are barred by the statute of limitations.

4. Plaintiff Magee's Loans with CitiFinancial

None of the Defendants argue that Magee's January 19, 2001, loan with CitiFinancial is barred by the statute of limitations.

5. Plaintiff Newman's Loans with CitiFinancial

None of the Defendants argue that Newman's March, 1999, loan with CitiFinancial is barred by the statute of limitations.

6. Plaintiff White's Loans with CitiFinancial

Plaintiff White took out loans with CitiFinancial on the following dates: January 23, 1996, May 10, 1996, and December 19, 1997. *See* Response, Exhibit "A6." With each of these loans, White purchased insurance and, as part of the

loan transaction, signed disclosure statements or combined note and security agreements containing one or more of the following provisions:

> "Insurance Disclosure: Borrower is not required to purchase any type of insurance to obtain Credit, unless Borrower grants Lender a security interest as indicated in this document. In that event, insurance to protect the Lender's interest in the collateral may be required. Lender's decision to grant credit will not be affected by Borrower's decision to purchase or refuse optional insurance products . . . .;"
>
> "NOTE: NON-COMPULSORY INSURANCE VOLUNTARILY PURCHASED BY DEBTOR. I hereby declare that the purchase of the above insurance is entirely voluntary and has not been made compulsory by the creditor and that the creditor has in no way led me to believe that such insurance is a prerequisite to the extending of credit to me. I further declare that the option has been extended to me to purchase this insurance from any insurer or agent of my own choice. I freely choose the insurer and agent to whom the authorization is given."

See id. For the reasons stated in section III.A.1. above, the Court finds that any claims White had as to her January 23, 1996, May 10, 1996, and December 19, 1997, loans with CitiFinancial are barred by the statute of limitations. The Court therefore finds that, as a matter of law, White cannot prevail on any of her claims against the individual Defendants.

7. Plaintiff Ross' Loans with CitiFinancial

Plaintiff Ross took out a loan with CitiFinancial in 1996. *See* Rebuttal, Exhibit "17," Affidavit of Ross. She refinanced the loan in 1997 and avers that she was required to purchase credit disability insurance, credit life insurance and property insurance with the refinanced loan.[6] *See id.* Ross further avers that she "relied [on] the two white females' statements to [her] that she could not obtain the initial loan or refinance the loan balance unless [she] purchased the credit insurance." *See id.* However, as Ross has not presented any evidence of affirmative acts by Defendants relating to either of her loans that prevented her from discovering her claims against them, the Court finds that Ross has not established a claim of fraudulent concealment and that the statute of limitations was not tolled as to her claims against Defendants. Accordingly, the Court finds that any claims Ross had as to her 1996 and 1997 loans with CitiFinancial are barred by the statute of limitations.

Having found that, as a matter of law, Plaintiffs White and Ross cannot prevail on any of their claims against the individual Defendants, the Court finds that the only claims before the Court are those relating to the following loans: Allen's July 22, 1999, loan; Whitley's September 11, 1998, May 10, 2000, and September 11, 2000, loans; King's August 15, 1998, loan; Magee's January 19, 2001, loan; and Newman's March, 1999, loan.

B. Plaintiffs' Breach of Fiduciary Duty Claim

Plaintiffs allege that Defendants breached their fiduciary

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6. Defendants did not submit any documentation regarding the 1996 loan, or the 1997 refinance of Ross' loan.

duty to Plaintiffs to (1) obtain adequate insurance at a fair and reasonable price, (2) act in the best interests of Plaintiffs, and (3) disclose to Plaintiffs that Defendants directly or indirectly received remuneration for the insurance policies they sold to them. *See* ¶¶ 56-60. The individual Defendants argue that there is no reasonable possibility that Plaintiffs can succeed on their breach of fiduciary duty claims because the individual Defendants did not owe the Plaintiffs any fiduciary duty as a matter of Mississippi law. *See* Response.

The Mississippi Supreme Court has held that "fiduciary relationship is a very broad term embracing both technical fiduciary relations and those formal relations which exist wherever one person trusts in or relies upon another." *Hopewell Enters., Inc. v. Trustmark Nat'l Bank*, 680 So. 2d 812, 816 (Miss. 1996). Therefore,

> [w]henever there is a relation between two people in which one person is in a position to exercise a dominant influence upon the other because of the latter's dependency upon the former, arising from either weakness of mind or body, or through trust, the law does not hesitate to characterize such relationship as fiduciary in character. The basis of this relationship need not be legal; it may be moral, domestic, or personal.

Id. (quoting *Hendricks v. James*, 421 So. 2d 1031, 1041 (Miss. 1982)). Additionally, a "confidential relationship, which imposes a duty similar to a fiduciary relationship, may arise when one party justifiably imposes special trust and confidence in another, so that the first party relaxes care and vigilance that he would normally exercise in entering into a transaction with a stranger." *Lowrey v. Guaranty Bank and Trust Co.*, 592 So. 2d 79, 83 (Miss. 1991). *But cf. Burley v. Homeowners*

Warranty Corp., 773 F. Supp. 844, 860 (S.D. Miss. 1990) (Lee, J.) (stating "there is no fiduciary relationship between an insurer and insured in a first-party contract").

Based on the evidence in the record, and supporting and opposing authority, the Court finds that, as a matter of Mississippi law, no fiduciary relationship existed between the individual Defendants and Plaintiffs. The Court therefore finds that Defendants have satisfied their burden of showing that Plaintiffs cannot prevail on their claims of breach of fiduciary duty against the individual Defendants.

C. Plaintiffs' Breach of Implied Covenants of Good Faith and Fair Dealing Claim

Plaintiffs allege that Defendants breached the implied covenants of good faith and fair dealing "by obtaining inadequate insurance for Plaintiffs and charging an exorbitant and grossly unfair premium which was far in excess of the market rate." Complaint, ¶¶ 67. Defendants argue that, because the individual Defendants were not parties to the subject insurance contracts, Plaintiffs cannot state a claim for breach of implied covenants of good faith and fair dealing. The Court agrees.

The duty of good faith and fair dealing is implied in the performance and enforcement of all contracts, *see Cenac v. Murry*, 609 So. 2d 1257, 1272 (Miss. 1992), but only "arises from the existence of a contract between parties." *American Bankers Ins. Co. of Florida v. Wells*, 2001 WL 1554028, *9 (Miss. 2001) (citing *Cenac*, 609 So. 2d at 1272) (emphasis in original). Plaintiffs contracted with the Insurance Defendants. As the individual Defendants merely served as the agent of the Insurance Defendants in the subject loan transactions and were not parties to the subject contracts, the Court finds that the

individual Defendants were not subject to the implied duty of good faith and fair dealing. *See Griffin v. Ware*, 457 So. 2d 936, 940 (Miss. 1984) (stating that "adjusters employed by an insurer, who were not parties to the agreement for insurance, are not subject to an implied duty of good faith and fair dealing to the insured"). *See also Burley*, 773 F. Supp. at 860 (stating "there is no implied covenant of good faith in a first-party insurance contract"). Moreover, the breaches alleged go to the formation of the contracts, rather than the performance and enforcement of the contracts. Accordingly, the Court finds that, as a matter of law, Plaintiffs cannot prevail on their claims of breach of implied duty of good faith and fair dealing against the individual Defendants.

D. Plaintiffs' Fraudulent and Negligent Misrepresentation and/or Omission Claims

Plaintiffs allege that Defendants, by their deliberate and knowingly "fraudulent misrepresentations, omissions and concealment . . . purposely deceive[d] Plaintiffs into believing that Defendants were obtaining and furnishing adequate credit life, credit disability, property and/or collateral protection insurance for them at a fair price . . . ." Complaint ¶ 73. In order to succeed in a claim for fraudulent misrepresentation, a plaintiff must prove that: (1) defendant or his agent made a representation (2) that was false (3) and material (4) and that the person making the representation knew it to be false and (5) intended that the plaintiff act upon the representation in the manner reasonably contemplated. *See Levens v. Campbell*, 733 So. 2d 753, 761-62 (Miss. 1999). A plaintiff must also prove that (6) he was unaware that the representation was false, (7) he relied on the truth of the representation, (8) had a right to rely on the representation, and that (9) he suffered consequent and proximate injury. *See id.* A claim of negligent misrepresentation requires proof that: (1) defendant

failed to exercise reasonable care in making (2) a misrepresentation or omission of a fact that was (3) material or significant, and that plaintiff reasonably relied on the misrepresentation or omission and was (4) damaged as a result of her reasonable reliance. *See id.* at 762.

1. The Fraudulent and Negligent Misrepresentation Claims of Allen, Whitley, and Magee

Defendants have submitted signed and dated loan documents associated with Allen's July 22, 1999, loan with CitiFinancial, and Whitley's September 11, 1998, and September 11, 2000, loans with CitiFinancial which contained express language regarding insurance and the fact that their loans were not conditioned upon the purchase of insurance.[7] *See above* sections III.A.1., III.A.3., and III.A.6. Although it is disputed whether Plaintiff Magee dealt with any of the individual Defendants, the Court notes that Magee also signed a disclosure statement in connection with her January 19, 2001, loan with CitiFinancial. The combined Disclosure Statement, Note and Security Agreement was dated January 19, 2001, and contained the following language: ["]Optional Insurance: Credit life insurance, credit disability insurance, credit personal property insurance, involuntary unemployment insurance and any other insurance products that are not required per the above paragraph are optional to Borrower and are not required in order to obtain credit . . . . Borrower is encouraged to inquire about

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7. Whitley also took out a loan with CitiFinancial on May 10, 2000. *See* Response, Exhibit "A7." However, as Whitley has presented no evidence that she purchased insurance in connection with this loan, the Court finds that, as a matter of law, Whitley cannot prevail on her claims of fraudulent and negligent misrepresentations against the individual Defendants relating to her May 10, 2000, loan with CitiFinancial.

coverage and refund provisions."[8]

As previously stated by the Court with regard to Plaintiffs' fraudulent concealment defense, Plaintiffs could not reasonably rely on a representation of Defendants contrary to the express language of the contracts which they signed. *See* section "III.A.2." As both fraudulent and negligent misrepresentation claims require a finding by the Court of reasonable reliance on the alleged misrepresentation or omission, the Court therefore finds that, as a matter of law, Plaintiffs Allen and Magee cannot prevail on their claims of fraudulent and negligent misrepresentation against the individual Defendants. The Court further finds that, as a matter of law, Whitley cannot prevail on her fraudulent and negligent misrepresentation claims against the individual Defendants relating to her CitiFinancial loans of September 11, 1998, and September 11, 2000.

2. The Fraudulent and Negligent Misrepresentation Claims of King

King submitted conflicting evidence with regard to King's August 15, 1999, loan with CitiFinancial. King testified in her deposition of November 7, 2001, that the individual Defendants did not mention insurance during the closing of her loan. Rather, King testified, "the only time [the individual Defendants] talked about insurance was on the phone and when [she] went into the [CitiFinancial] office" on January 5, 1998. *See* Rebuttal, Exhibit "4," at 45. However, with her affidavit of January 31, 2002, King averred that the individual Defendants

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8. The "above paragraph" provided that insurance against fire was required for loans secured by the borrower's interest in improved property and collision and comprehensive insurance was required if the collateral for the loan was a motor vehicle. *See* Response, Exhibit "A3."

"told [her that] in order for [her] to . . . refinance [her] loan, [she] was required under [CitiFinancial] policy to purchase credit disability insurance, credit life insurance and property insurance." *See* Rebuttal, Exhibit "14." Thus, King's affidavit contradicts her own prior sworn testimony.

The United States Court of Appeals for the Fifth Circuit has held in the context of summary judgment motions, that such a conflict between sworn testimony must be explained. *See Copeland v. Wasserstein, Perella & Co., Inc.*, 278 F.3d 472, (5th Cir. 2002) (citing *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 495 (5th Cir. 1996) (stating "It is well settled that this court does not allow a party to defeat a motion for summary judgment using an affidavit that impeaches, without explanation, sworn testimony.")). The Court finds that this rule also applies in the context of motions to remand wherein the Court utilizes a summary judgment-like standard in determining whether a party has been fraudulently joined to defeat diversity jurisdiction. Therefore, a party seeking remand may not, without explanation, use an affidavit which conflicts with prior sworn testimony to create a factual dispute which, when resolved in the moving party's favor, requires remand of the action. As King has offered no explanation for the conflict between her affidavit and prior sworn testimony regarding the representations allegedly made by the individual Defendants on August 15, 1999, the Court does not consider the affidavit in its determination of whether King can state claims of fraudulent and negligent misrepresentation. However, even if the Court were to ignore the conflict in King's sworn testimonies and accept as true King's averment that the individual Defendants represented to her that the purchase of insurance was required to refinance her loan, the Court finds no evidence in the record to show that the conduct of the individual Defendants rises to the level of gross negligence, malice or reckless disregard for the rights of King. The Court therefore finds that King cannot

prevail on her claims of fraudulent and negligent misrepresentation against the individual Defendants.

3. The Fraudulent and Negligent Misrepresentation Claims of Newman

With regard to Newman's March, 1999, loan with CitiFinancial, Defendants submitted evidence showing that a check for $2,000 dated March 16, 1999, was written to Newman and drawn on the account of First Family Financial Services. Defendants did not submit any evidence that Newman signed or received a disclosure statement or any other document containing language like that quoted above. However, Newman did not allege that Mitchell, the individual Defendant with whom he worked on the March, 1999, loan, misrepresented the necessity of insurance with regard to his CitiFinancial loan.[9] Newman testified, in fact, that he could not remember ever discussing insurance with Mitchell, and did not know whether he had purchased insurance in connection with the subject loan. *See* Rebuttal, Exhibit "7," Deposition Testimony of Newman. The Court finds that, as Newman has not presented any admissible evidence showing that he purchased insurance from Defendants in connection with his March, 1999, CitiFinancial loan, there is no possibility that he can prevail on his claims of fraudulent or negligent misrepresentation and/or omission against Mitchell.

E. Plaintiffs' Civil Conspiracy Claim

Plaintiffs allege that "Defendants entered into a civil

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9. Newman's fraudulent and negligent misrepresentation and/or omission claims appear to be based on alleged failures of Mitchell to inquire or disclose certain information regarding insurance. *See* Response, Exhibit "C6," Answer to Interrogatory.

conspiracy with each other and insurance companies to sell credit life, credit disability, property and/or collateral protection insurance to Plaintiffs that was unnecessary and at an exorbitant premium far in excess of the market rate." Complaint ¶ 87. However, the Fifth Circuit has held that

> [i]t is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.

Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952). Therefore, unless "individual defendants are . . . shown to have acted outside of their employment capacities, they are incapable of conspiring with their corporate employer." *Cooper v. Drexel Chemical Co.*, 949 F. Supp. 1275, 1285 (N.D. Miss. 1996). The Court finds no evidence in the record that the individual Defendants acted "outside of their employment capacities" with regard to Plaintiffs' claims of civil conspiracy. *See id.* The Court therefore finds that, as a matter of law, Plaintiffs cannot prevail on their claims of civil conspiracy against the individual Defendants.

F. Plaintiffs' Negligence Claim

Plaintiffs allege that Defendants breached their "duty to . . . exercise reasonable care to ensure that Plaintiffs received credit life, credit disability, property and/or collateral protection insurance which was both adequately and fairly priced." Complaint ¶¶ 92-93. Plaintiffs allege that Defendants: failed to obtain adequate insurance for Plaintiffs, failed to obtain insurance at the prevailing market rate, charged an excessive interest rate and related charges for the subject insurance policies, and failed to provide Plaintiffs with a signed and dated

copy of their insurance policies.

Defendants argue that the duties Plaintiffs allege were breached are essentially fiduciary duties and that failure to act where there is no duty to act is not negligence. The Court agrees. Having found that no fiduciary relationship existed between Plaintiffs and the individual Defendants, *see* section "III.B.," the Court finds that the individual Defendants had no duty to act or not act as Plaintiffs allege. Moreover, the Court finds no evidence in the record to show that the individual Defendants engaged in the conduct about which Plaintiffs complains, or which otherwise rises to the level of gross negligence, malice or reckless disregard for the rights of Plaintiffs. The Court therefore finds that Plaintiffs cannot prevail on their claim of negligence against the individual Defendants.

G. Plaintiffs' Claim of Unconscionability Under the UCC

Plaintiffs allege that the "conduct, acts, and omissions of the Defendants constitutes [sic] unconscionable practices, individually and collectively, under the UCC," Complaint ¶ 97, and seek both compensatory and punitive damages with regard to their unconscionability claim. Although not cited by Plaintiffs, the remedy for unconscionability under the UCC is set forth in section 75-2-302 of the Mississippi Code (providing that the court, upon a finding as a matter of law that the contract or any clause of the contract is unconscionable, refuse to enforce the contract, or enforce that part of the contract that is not unconscionable or limit the application of the unconscionable clause so as to avoid an unconscionable result). This section 75-2-302 only applies to the sale of goods, however. *See* Miss. Code Ann. § 75-2-102 (providing that "this chapter applies to transactions in goods"). *See also Huff v. Hogbood*, 549 So. 2d 951, 953 (Miss. 1989) ("When one

contracts for the sale of goods . . . , the transaction is governed by the UCC as adopted in Miss. Code Ann. §§ 75-2-101 to – 725").

Goods are defined by the UCC as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale . . . ." Miss. Code Ann. § 75-2-105(1). The Court questions whether an insurance policy fits within the definition of "goods." Plaintiffs have not referred the Court to authority supporting their contention that the sale of insurance is a transaction in goods governed by the UCC. To the contrary, most courts have held that an insurance policy is not goods as defined by the UCC. *See Bartley v. National Union Fire Ins. Co.*, 824 F. Supp. 624, 636 (N.D. Tex. 1992) (finding that insurance contracts do not fit within the definition of goods promulgated by the Uniform Commercial Code); *Elrad v. United Life & Acc. Ins. Co.*, 624 F. Supp. 742, 744 (N.D. Ill. 1985) (finding that, under the definition of "goods" adopted by Illinois, which is identical to the definition found at Miss. Code Ann. § 75-2-105(1), life insurance contracts were not "goods" within the scope of the Uniform Commercial Code); *Oxford Lumber Co. v. Lumbermens Mutual Ins. Co.*, 472 So. 2d 973, 978 (Ala. 1975) (finding that the issuance of an insurance contract is a service, and not a product subject to the sales of goods provisions under the Uniform Commercial Code). *Compare Johnson Enter. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1314 (11th Cir. 1998) (finding the UCC inapplicable to a contract for the sale of services).

The Court therefore finds that the subject insurance contracts are not goods as defined by section 75-2-105 of the Mississippi Code. Accordingly, the Court finds that, as a matter of law, Plaintiffs cannot prevail on their claim of unconscionability under the UCC against the individual

Defendants.

IV. Conclusion

Having found that Plaintiffs cannot prevail on any of their claims against the individual Defendants, the Court finds that the individual Defendants were fraudulently joined as defendants in this action.[10] As all of the non-diverse Defendants in this case were fraudulently joined, their citizenship will not be considered for the purpose of diversity of citizenship jurisdiction analysis under 28 U.S.C. § 1332. Therefore, as the statutory requisites for diversity of citizenship jurisdiction are satisfied, the Court finds that it has federal subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332.

IT IS THEREFORE ORDERED that the motion of Plaintiffs [6-1, 7-1] to Remand is hereby denied.

IT IS FURTHER ORDERED that the Motion of Plaintiffs [6-2, 7-2] for Attorneys' Fees is hereby denied.

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10. Having found that the individual Defendants were fraudulently joined as defendants in this action, the Court need not consider whether they were misjoined under Miss. R. Civ. P. 20 and 82(c).

APPENDIX C

UNITED STATES DISTRICT COURT,
S.D. MISSISSIPPI, JACKSON DIVISION

No. CIV.A.3:01-CV-471BN

DENISE HOWARD, LENA CHAMBERS, PRISCILLA CHALMERS, BETTY WHITLEY, FAYE DENISE LOGAN, CAROL BUSECK, KELVIN JOHNSON, PHILLIP GORDON, DEBBIE GORDON, ALISHA F. WILSON, MARGARET HAYMON, WANDA ALLEN, MONROE HOGGATT, EUGENE HAYMON, AND EVA PARKER HALL,

Plaintiffs,

v.

CITIFINANCIAL, INC., A MARYLAND CORPORATION F/K/A FIRST FAMILY FINANCIAL SERVICES, INC., CITIFINANCIAL, INC., A MARYLAND CORPORATION F/K/A COMMERCIAL CREDIT OF MISSISSIPPI, INC., CITIFINANCIAL, INC., A TENNESSEE CORPORATION F/K/A FIRST FAMILY FINANCIAL SERVICES, INC., CITIFINANCIAL, INC., A TENNESSEE CORPORATION F/K/A COMMERCIAL CREDIT OF MISSISSIPPI, INC., CITIFINANCIAL SERVICES, INC., A GEORGIA CORPORATION, UNION SECURITY LIFE INSURANCE COMPANY, AMERICAN SECURITY INSURANCE COMPANY, TRACY MITCHELL, DARLA FARMER, VALERIE STEVENS, AND JOHN DOES 1-50,

Defendants.

March 13, 2002

OPINION AND ORDER

Barbour, District Judge.

This cause is before the Court on the Motion of Plaintiffs to Remand. Having considered the Motion, Response, Rebuttal, attachments to each, and supporting and opposing authority, the Court finds that the Motion is not well taken and should be denied.

I. Background and Procedural History

Plaintiffs all entered loan agreements with either Defendants CitiFinancial, Inc., f/k/a First Family Financial Services, Inc., Defendants CitiFinancial, Inc., f/k/a Commercial Credit of Mississippi, Inc., or CitiFinancial Services, Inc. (collectively "CitiFinancial").[1] In conjunction with the loans, Plaintiffs purchased various insurance policies through Defendants Union Security Life Insurance Company ("Union Security") and/or American Security Insurance Company ("American Security") (collectively "Insurance Defendants").

On May 9, 2001, Plaintiffs filed a complaint in the

1. Plaintiffs Denise Howard ("Howard"), Wanda Allen ("Allen"), and Eva Parker Hall ("Hall") voluntarily dismissed their claims against all Defendants without prejudice on September 20, 2001. Plaintiff Betty Whitley voluntarily dismissed her claim against all Defendants without prejudice on January 3, 2002.

Circuit Court of Holmes County, Mississippi, against CitiFinancial, the Insurance Defendants, Tracy Mitchell ("Mitchell"), Darla Farmer ("Farmer") and Valerie Stevens ("Stevens") (collectively "individual Defendants").[2] Plaintiffs allege that, "[c]ontrary to law, the Defendants required collateral protection insurance, credit life insurance, credit accident and health insurance, accidental death and dismemberment insurance, involuntary unemployment insurance, property insurance, and/or other insurance in connection with their loans to Plaintiffs." Complaint, ¶ 29. Plaintiffs also allege that the premiums paid for the allegedly required insurance products were excessive in comparison to similar products on the market, and that they were not offered alternative, and presumably less costly, insurance. Plaintiffs allege that the premiums were inflated because of undisclosed commissions and other remuneration received from the Defendant insurers for selling their policies. Plaintiffs further allege that Defendants engaged in insurance packing, padding, flipping, and churning in violation of Mississippi law. Based on this conduct, Plaintiffs allege claims of breach of fiduciary duty, breach of implied covenants of good faith and fair dealing, fraudulent and negligent misrepresentation and/or omission, civil conspiracy, negligence, and unconscionability under the Uniform Commercial Code of Mississippi ("UCC").

On June 11, 2001, the CitiFinancial Defendants and Insurance Defendants removed the lawsuit to this Court pursuant to 28 U.S.C. § 1441 on the basis of diversity of

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2. Mitchell, Farmer and Stevens are or were licensed insurance agents of CitiFinancial.

citizenship jurisdiction under 28 U.S.C. § 1332.[3] For the purpose of diversity analysis, Defendant CitiFinancial, Inc., f/k/a First Family Financial Services, Inc., and Commercial Credit of Mississippi, Inc., are Maryland corporations with their principal places of business in Maryland. Defendant CitiFinancial, Inc., f/k/a First Family Financial Services, Inc., and Commercial Credit of Mississippi, Inc., are Tennessee corporations with their principal places of business in Tennessee. Defendant CitiFinancial Services, Inc., is a Georgia corporation with its principal place of business in Georgia. Defendants Union Security and American Security are Delaware corporations with their principal places of business in Georgia. Defendants Tracy Mitchell, Darla Farmer, and Valerie Stevens are citizens of Mississippi. Defendants contend that Plaintiffs have fraudulently joined the non-diverse Defendants to avoid federal jurisdiction and, therefore, the Court may properly assert federal subject matter jurisdiction over this case. Plaintiffs filed the instant Motion to Remand on July 6, 2001.[4]

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3. In their Notice of Removal, Defendants "reserve[d] the right to supplement [their] Notice of Removal by adding additional Plaintiffs who may be in bankruptcy or whose claims are property of their bankruptcy estates." Notice of Removal ¶ 14. Defendants filed supplements to their Notice of Removal on August 20, 2001, September 4, 2001, and September 7, 2001, adding the bankruptcies of Howard, Allen, and Parker, respectively. As these Plaintiffs were voluntarily dismissed, the Court need not decide the propriety of such supplementation, nor consider their bankruptcies for jurisdictional purposes. *See Allen v. City Fin. Co.*, 224 B.R. 347, 353 (S.D. Miss. 1998).

4. In response to the supplements of Defendants to their Notice of Removal, Plaintiffs amended their Motion to Remand on September 7, 2001, and September 17, 2001, to challenge the assertion of Defendants that subject matter jurisdiction existed based on the bankruptcies of Howard, Allen, and Parker.

II. Fraudulent Joinder Standard

Under 28 U.S.C. § 1441(a), "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed . . . to the district court of the United States for the district and division embracing the place where such action is pending." The removing party has the burden of proving that the federal court has jurisdiction to hear the case. *See Jernigan v. Ashland Oil, Inc.*, 989 F.2d 812, 815 (5th Cir. 1993), *cert. denied*, 510 U.S. 868, 114 S. Ct. 192, 126 L. Ed. 2d 150 (1993); *Laughlin v. Prudential Ins. Co.*, 882 F.2d 187, 190 (5th Cir. 1989) (holding that the "removing party bears the burden of establishing federal jurisdiction."). In cases in which the removing party alleges diversity of citizenship jurisdiction on the basis of fraudulent joinder, "it has the burden of proving the fraud." *Laughlin*, 882 F.2d at 190; *Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98, 100 (5th Cir. 1990), *cert. denied* 498 U.S. 817, 111 S. Ct. 60, 112 L. Ed. 2d 35 (1990). To establish fraudulent joinder, the removing party must prove: (1) that there was actual fraud in the plaintiff's pleading of the jurisdictional facts or (2) that the plaintiff has no possibility of establishing a cause of action against the non-diverse defendant in state court. *Griggs v. State Farm Lloyds*, 181 F.3d 694, 699 (5th Cir. 1999) (citations omitted); *Burden v. General Dynamics Corp.*, 60 F.3d 213, 217 (5th Cir. 1995); *Cavallini v. State Farm Mutual Auto Ins. Co.*, 44 F.3d 256, 259 (5th Cir. 1995).

When considering whether a non-diverse defendant has been fraudulently joined to defeat diversity of citizenship jurisdiction, courts should "pierce the pleadings" and consider "summary judgment-type evidence such as affidavits and deposition testimony." *See e.g. Cavallini*, 44 F.3d at 256. *See also LeJeune v. Shell Oil Co.*, 950 F.2d 267, 271 (5th Cir. 1992) (holding that "a removing party's claim of fraudulent

joinder to destroy diversity is viewed as similar to a motion for summary judgment . . . . A court is to pierce the pleadings to determine whether, under controlling state law, the non-removing party has a valid claim against the non-diverse parties."). Under this standard, plaintiffs "may not rest upon the mere allegations or denials of [their] pleadings." *Beck v. Texas State Bd. of Dental Examiners*, 204 F.3d 629, 633 (5th Cir. 2000). *See also Badon v. RJR Nabisco, Inc.*, 236 F.3d 282, 286 n.4 (5th Cir. 2000) (finding that the "mere theoretical possibility of recovery under local law" does not preclude removal. Plaintiffs must show that there exists "a reasonable basis for predicting that state law would allow recovery in order to preclude a finding of fraudulent joinder."). Further, conclusory or generic allegations of wrongdoing on the part of the non-diverse defendant are not sufficient to show that that defendant was not fraudulently joined. *See Badon v. RJR Nabisco, Inc.*, 224 F.3d 382, 392-93 (5th Cir. 2000); *Peters v. Metropolitan Life Ins. Co.*, 164 F. Supp. 2d 830, 834 (S.D. Miss. 2001) (J. Bramlette) (holding that the allegations against non-diverse defendants "must be factual, not conclusory, because conclusory allegations do not state a claim."). Therefore, when responding to a charge of fraudulent joinder, a plaintiff must allege specific acts of wrongdoing on the part of the non-diverse defendant in the complaint and submit evidence to support those claims. *See Badon*, 224 F.3d at 390 (holding that removal is not precluded merely because the state court complaint, on its face, sets forth a state law claim against a non-diverse defendant. Removal is proper "if the plaintiff's pleading is pierced and it is shown that as a matter of law there is no reasonable basis for predicting that the plaintiff might establish liability on that claim against the instate defendant.").

When conducting a fraudulent joinder analysis, a court must resolve all disputed questions of fact and ambiguities of

law in favor of the non-removing party, *see Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir. 1992), but "only when there exists an actual controversy, i.e. when both parties have submitted evidence of contradictory facts." *Badon*, 224 F.3d at 394. A court should not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts" to support his claims against the non-diverse defendant. *Id.* (citing *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)) (alteration in original). In the event the court, after resolving all disputed questions of fact and ambiguities of law in favor of the non-removing party, finds that there is "arguably a reasonable basis for predicting that the state law might impose liability on the facts involved, then there is no fraudulent joinder" and hence no basis for asserting diversity of citizenship jurisdiction. *Jernigan*, 989 F.2d at 816.

III. Analysis

As a preliminary matter, the Court considers Plaintiffs argument that the removal was untimely. Plaintiffs argue that Defendants were served with process on May 11, 2001 and that the 30 day time limit for removal under section 1446(b) expired on June 10, 2001. Plaintiffs argue that, because Defendants filed their Notice of Removal on June 11, 2001, the removal is untimely and this action must be remanded. The Court does not agree. While the thirtieth day was, indeed, June 10, 2001, Rule 6(a) of the Federal Rules of Civil Procedure provides in pertinent part, "The last day of the [time] period . . . shall be included, unless it is a Saturday, a Sunday, or a legal holiday . . . in which event the period runs until the end of the next day which is not one of the aforementioned days." As June 10, 2001, was a Sunday, the 30 day removal period ran until the end of Monday, June 11, 2001. The Court therefore finds that the removal was timely and that the Motion

to Remand on this ground is not well taken and should be denied.

Plaintiffs allege that as agents of CitiFinancial, Mitchell, Farmer, and Stevens may be held liable on the claims alleged in the Complaint. Under Mississippi law, an agent can incur independent liability if he engages in conduct which rises to the level of gross negligence, malice or reckless disregard for the rights of the plaintiff. *See Bass v. California Life Ins. Co.*, 581 So. 2d 1087, 1090 (Miss. 1991). The issue before the Court is whether there is a possibility that liability could be imposed on the non-diverse Defendants/agents based on the facts of the case.

A. Are Plaintiffs' Claims Time Barred?

The record shows that only Plaintiffs Carol Buseck ("Buseck"), Kelvin Johnson ("Johnson"), and Monroe Hoggatt ("Hoggatt") assert claims against the individual Defendants.[5] Defendants argue that Plaintiffs' claims are governed by the general, three year statute of limitations found at MISS. CODE ANN. § 15-1-49(1). Defendants also argue that statute of limitations began to run on Plaintiffs' claims on the date each Plaintiff took out their loans with Defendants. *See* Memorandum of Insurance Defendants in Opposition to Motion to Remand. That is, no general discovery rule tolled the statute as to Plaintiffs' claims.

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5. As previously noted, Plaintiffs Betty Whitley, Denise Howard, Wanda Allen and Eva Parker Hall have been voluntarily dismissed from this action. Plaintiffs Lena Chambers, Priscilla Chalmers, Faye Denise Logan, Alisha F. Wilson, Margaret Haymon and Eugene Haymon stated in response to Interrogatory 4 propounded by the Insurance Defendants that they have no claims against the individual Defendants. *See* Response, Exhibit "C." Phillip Gordon and Debbie Gordon have stipulated that they have no claims against the individual Defendants. *See* Response, Exhibit "D."

Plaintiffs allege that they "were unaware of the Defendants' wrongful conduct . . . and could not have at any time earlier [than the filing of their Complaint] discovered Defendants' wrongful conduct, which included Defendants' affirmative and fraudulent concealment of their wrongful conduct . . . ." Complaint ¶ 28. Thus, Plaintiffs argue that the statute of limitation was tolled by the alleged fraudulent concealment of Defendants of their allegedly wrongful conduct.

The Court finds that, as there are no periods of limitation prescribed by statute for the causes of action asserted by Plaintiffs, the general, three year statute of limitations is applicable to all of Plaintiffs' claims. The Court further finds that the general statute of limitations may be tolled pursuant to Miss. Code Ann. § 15-1-67 (providing, "If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered"). Accordingly, the Court finds that, unless tolled by section 15-1-67, Plaintiffs' claims that accrued before May 9, 1998, are time barred. In order to determine whether the statute of limitations was tolled as Plaintiffs contend, the Court must consider each of Plaintiffs' loans with CitiFinancial, the insurance policies associated with each loan, the disclosures made by CitiFinancial with regard to each loan, and any affirmative acts whereby Defendants fraudulently concealed Plaintiffs' claims.

1. Plaintiff Buseck's Loans with CitiFinancial

Plaintiff Buseck took out a number of loans between September of 1996 and July of 2001. Buseck avers that

CitiFinancial loaned her $3,000 on September 25, 1996 ("the first loan"). *See* Rebuttal, Exhibit "14," Affidavit of Buseck. Buseck purchased no insurance with this loan, but refinanced the loan on February 27, 1997, "at the request of . . . Mitchell" who told her that "in order for [her] to refinance [her] loan, [she] was required under [CitiFinancial] policy to purchase credit disability insurance, credit life insurance and property insurance." *See id.* Buseck avers that, at the time she signed for this loan, she "did not see or read any disclosure which indicated that credit insurance was not required in order for [her] to make this loan."

On May 5, 1997, Buseck took out a home mortgage loan with CitiFinancial. *See id.* Buseck refinanced her first loan into the mortgage loan and purchased credit life insurance with the new loan. *See id.* Buseck avers that she was told by Farmer "that in order for [her] to obtain the May 7, 1997, loan [she] would have to purchase credit life insurance in connection with the loan." Buseck avers that, at the time she signed for the mortgage loan, she "did not see or read any disclosure which indicated . . . that credit insurance was not required in order for [her] to make th[e] loan . . . ." *See id.*

Defendants have submitted a disclosure statement signed by Buseck on May 5, 1997, as part of her mortgage loan which stated, "CREDIT LIFE OR CREDIT DISABILITY INSURANCE IS NOT REQUIRED TO OBTAIN THIS LOAN." *See* Response, Exhibit "A." Immediately above her signature appears the following: "I/WE HAVE READ THIS NOTICE AND HAVE MADE THE CHOICE ABOVE BEFORE SIGNING ANY NOTE OR OTHER PAPER REPRESENTING A LOAN." *See id.* It is well settled under Mississippi law that a contracting party is under a legal obligation to read a contract before signing it. *See Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber &*

Supply Co., Inc., 584 So. 2d 1254, 1257. *See also Koenig v. Calcote*, 199 Miss. 435, 25 So. 2d 763 (1946); *McCubbins v. Morgan*, 199 Miss. 153, 23 So. 2d 926 (1945). Moreover, knowledge of the contents of a contract will be imputed to a contracting party even though she did not read the contract before signing it. *See Cherry v. Anthony, Gibbs, Sage*, 501 So. 2d 416, 419 (Miss. 1987). Where, as here, the terms of a contract are made available to a contracting party, any reliance on alleged misrepresentations of those terms is, as a matter of law, unreasonable. *See Carter v. Union Security Life Ins. Co.*, 148 F. Supp. 2d 734 (S.D. Miss. 2001) (Lee, J.).

Plaintiffs refer the Court to an exception to the above stated rule set forth by the Mississippi Supreme Court in *Turner v. Terry*, 799 So. 2d 25, 2001 WL 171318 (Miss. 2001) (holding that, "[w]here one party's false representations *induce* another party to contract, negligence of the second party cannot be raised to bar relief to him. Thus, failure to read a contract before signing it . . . will not bar equitable relief to one who has executed a contract in reliance upon false representations made to him by the other contracting party" (emphasis added)). The Court finds the exception inapplicable to the case sub judice, however. Plaintiffs do not allege that they were induced to contract by the representations of Defendants, but rather that they contracted with Defendants in spite of the alleged representations. The Court therefore finds that any claims Buseck had as to her mortgage loan with CitiFinancial accrued on May 5, 1997, the date on which she signed the disclosure statement, and are therefore barred by the statute of limitations. The Court further finds that any claim that Buseck had as to her first loan accrued no later than May 5, 1997, the date on which she indisputably had notice that credit life and credit disability insurance were not required to obtain a loan with CitiFinancial. *See* Miss. Code Ann. § 15-1-67 (providing that "the cause shall be deemed to have first accrued at, and not before, the time at

which such fraud shall be, or with reasonable diligence might have been, first known or discovered"). Therefore, any claims Buseck had as to her February 27, 1997, loan with CitiFinancial are also time barred.

On November 4, 1997, Buseck took out another loan with CitiFinancial. *See* Response, Exhibit "A1," Affidavit of Buseck. Buseck avers that Mitchell told her that the purchase of credit life and credit disability insurance were required in order for her to obtain a loan with CitiFinancial. *See id.* Buseck also avers that, at the time she made the loan, she never saw or read any disclosure stating that credit insurance was not required in order to obtain the loan. *See id.* Defendants have not produced evidence that Buseck signed a disclosure statement with regard to this loan. However, based on the disclosure statement signed by Buseck on May 5, 1997, which stated that the purchase of credit life and credit disability insurance was optional, the Court finds that Buseck had notice on November 4, 1997, that she was not required to purchase insurance in connection with her loan. Therefore, the Court finds that any claims Buseck had as to her November 4, 1997, loan with CitiFinancial are barred by the statute of limitations. Having found that Buseck's claims against CitiFinancial with regard to the loans listed above are time barred, and because Buseck did not purchase insurance with her CitiFinancial loans of July 30, 1999, or July 3, 2001, the Court finds that, as a matter of law, Buseck cannot prevail on any of her claims against the individual Defendants.

2. Plaintiff Hoggatt's Loans with CitiFinancial

Plaintiff Hoggatt took out a number of loans with CitiFinancial between August of 1997 and August of 1999. *See* Response, Exhibit "A2." However, he only purchased insurance in connection with the CitiFinancial loans of

February 11, 1998, and August 25, 1999. None of the Defendants argue Hoggatt's August 25, 1999, loan with CitiFinancial is time barred.

As for his February 2, 1998, loan, Hoggatt avers that he borrowed $4,248 from CitiFinancial, and that "Farmer told me that in order for me to get the loan, I was required to purchase credit life, credit disability and personal property insurance." *See* Rebuttal, Exhibit "12," Affidavit of Hoggatt. Hoggatt avers that he is "unable to read and understand documents," and that he "did not read any disclosure which indicated that credit insurance was not required in order for [him] to make th[e] loan."[6] *See id.* Hoggatt testified, however, that he was not prevented from reading the contract, and that he did not ask Farmer any questions regarding the contract. *See* Response, Exhibit "A2." Hoggatt also testified that he was given a copy of the contract.

Defendants have submitted evidence showing that, on February 11, 1998, Hoggatt signed a Combined Note and Security Agreement which clearly provided that "Credit Life and Disability Insurance are NOT REQUIRED in connection with this loan and were not a factor in the approval of this extension of credit. If you chose to obtain life insurance through Lender . . . the cost thereof is shown . . . herein and is included in the Amount Financed." *See* Response, Exhibit "A2." As previously stated, a contracting party has a duty to read what he signs and will be charged with knowledge

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6. It is unclear to the Court whether Hoggatt cannot read or merely has trouble reading. When asked under oath if he had read the August 19, 1997, loan documents before signing them, Hoggatt testified that he did not. *See* Rebuttal, Exhibit "4." When asked why he did not read the contract before signing it, Hoggatt testified that he "couldn't see too good. You know, I can't see them little letters too good." *See id.*

of what he signed even though he fails to read it. The rule that one "knows" what he signs does not change when one cannot read or has trouble reading. Rather, such a person has a duty to find someone to read the contract to him. Failure to do so is negligence. The Court therefore finds that any claims Hoggatt had as to the February 11, 1998 loan with CitiFinancial are barred by the statute of limitations.[7]

3. Plaintiff Johnson's Loans with CitiFinancial

Plaintiff Johnson avers that he took out loans with CitiFinancial in 1993 and 1995.[8] *See* Rebuttal, Exhibit "10," Affidavit of Johnson. With regard to each of these loans, Johnson avers that Mitchell told him that credit life, credit disability and property insurance were required in order to obtain the loan. *See id.* Johnson also avers that he did not see or read any disclosure indicating that such insurance was not required in order for him to obtain the loans. *See id.* Johnson alleges, however, Defendants affirmatively concealed their wrongful conduct, *see* Complaint ¶ 28, and that the statute of limitations on his claims was therefore tolled pursuant to section 15-1-67 of the Mississippi Code.

To establish a claim of fraudulent concealment under section 15-1-67, the Plaintiffs must (1) show "some act of an

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7. The Court notes that Defendants referred to an April 3, 1998, loan taken out by Hoggatt, but did not submit evidence of such a loan. Hoggatt does not aver or testify as to a loan with CitiFinancial originating on this date. Therefore, for purposes of this Motion, the Court does not consider any purported loan of April 3, 1998.

8. Defendants did not submit any documentary evidence regarding the 1993 or 1995 loans to Johnson. Johnson submitted a payment receipt for CitiFinancial loan number 53695580 initialed by "DF." The receipt is dated, but the date is illegible.

affirmative nature designed to prevent and which does prevent discovery of the claim," and (2) prove that "even though they acted with due diligence in attempting to discover [the claim], they were unable to do so." *Robinson v. Cobb*, 763 So. 2d 883, 887 (Miss. 2000). Johnson has not presented any evidence of an affirmative act by Defendants that prevented him from discovering his claims against them. Rather, Johnson, by his averments, has shown that he was not diligent in attempting to discover his claims. *See* Rebuttal, Exhibit "10" (stating that "despite informing Tracy Mitchell [that he already had insurance coverage of the type] she was attempting to sell [him], Tracy Mitchell continued to tell [him] that in order for [him] to refinance [his] loan, [he] was required" to purchase insurance, and further stating that, in connection with his 1995 loan, Johnson asked Mitchell "why [he] . . . had to buy credit insurance again because [he] already carr[ied] each of these insurances"). The Court therefore finds that Johnson has not established a claim of fraudulent concealment and that the statute of limitations was not tolled as to his claims against Defendants. Accordingly, the Court finds that, as a matter of law, Johnson cannot prevail on any of his claims against the individual Defendants.

Having found that, as a matter of law, Plaintiffs Buseck and Johnson cannot prevail on their claims against the individual Defendants, the Court finds that the only claims before the Court are those relating to Hoggatt's August 25, 1999, loan with CitiFinancial for which Mitchell served as agent. The Court therefore finds that Defendants have satisfied their burden of showing that Plaintiffs cannot prevail on any of their claims against Farmer and Stevens.

B. Plaintiffs' Breach of Fiduciary Duty Claim

Plaintiffs allege that Defendants breached their fiduciary

duty to Plaintiffs to (1) obtain adequate insurance at a fair and reasonable price, (2) act in the best interests of Plaintiffs, and (3) disclose to Plaintiffs that Defendants directly or indirectly received remuneration for the insurance policies they sold to them. Defendants argue that there is no reasonable possibility that Plaintiffs can succeed on their breach of fiduciary duty claims because Defendants did not owe the Plaintiffs any fiduciary duty as a matter of Mississippi law.

The Mississippi Supreme Court has held that "fiduciary relationship is a very broad term embracing both technical fiduciary relations and those formal relations which exist wherever one person trusts in or relies upon another." *Hopewell Enters., Inc. v. Trustmark Nat'l Bank*, 680 So. 2d 812, 816 (Miss. 1996). Therefore,

> [w]henever there is a relation between two people in which one person is in a position to exercise a dominant influence upon the other because of the latter's dependency upon the former, arising from either weakness of mind or body, or through trust, the law does not hesitate to characterize such relationship as fiduciary in character. The basis of this relationship need not be legal; it may be moral, domestic, or personal.

Id. (quoting *Hendricks v. James*, 421 So. 2d 1031, 1041 (Miss. 1982)). Additionally, a "confidential relationship, which imposes a duty similar to a fiduciary relationship, may arise when one party justifiably imposes special trust and confidence in another, so that the first party relaxes care and vigilance that he would normally exercise in entering into a transaction with a stranger." *Lowery v. Guaranty Bank and Trust Co.*, 592 So. 2d 79, 83 (Miss. 1991). *But cf. Burley v. Homeowners Warranty Corp.*, 773 F. Supp. 844, 860

(S.D. Miss. 1990) (Lee, J.) (stating "there is no fiduciary relationship between an insurer and insured in a first-party contract").

Based on the evidence in the record, and supporting and opposing authority, the Court finds that, as a matter of Mississippi law, no fiduciary relationship existed between Mitchell and Hoggatt. The Court therefore finds that Defendants have satisfied their burden of showing that Hoggatt cannot prevail on his claims of breach of fiduciary duty against Mitchell.

C. Plaintiffs' Breach of Implied Covenants of Good Faith and Fair Dealing Claim

Plaintiffs allege that Defendants breached the implied covenants of good faith and fair dealing "by obtaining inadequate insurance for Plaintiffs and charging an exorbitant and grossly unfair premium which was far in excess of the market rate." Complaint, ¶¶ 70. Defendants argue that, because the individual Defendants were not parties to the subject insurance contracts, Plaintiffs cannot state a claim for breach of implied covenants of good faith and fair dealing. The Court agrees.

The duty of good faith and fair dealing is implied in the performance and enforcement of all contracts, *see Cenac v. Murry*, 609 So. 2d 1257, 1272 (Miss. 1992), but only "arises from the existence of a contract between parties." *American Bankers Ins. Co. of Florida v. Wells*, 819 So. 2d 1196, ----, 2001 WL 1554028, *9 (Miss. 2001) (citing *Cenac*, 609 So. 2d at 1272) (emphasis in original). Hoggatt contracted with the Insurance Defendants. As Mitchell merely served as the agent of the Insurance Defendants in the subject loan transaction and was not a party to the subject contract, the Court

finds that Mitchell was not subject to the implied duty of good faith and fair dealing. *See Griffin v. Ware*, 457 So. 2d 936, 940 (Miss. 1984) (stating that "adjusters employed by an insurer, who were not parties to the agreement for insurance, are not subject to an implied duty of good faith and fair dealing to the insured"). *See also Burley*, 773 F. Supp. at 860 (stating "there is no implied covenant of good faith in a first-party insurance contract"). Moreover, the breaches alleged go to the formation of the contract, rather than the performance and enforcement of the contract. Accordingly, the Court finds that, as a matter of law, Hoggatt cannot prevail on his claims of breach of implied duty of good faith and fair dealing against Mitchell.

D. Plaintiffs' Fraudulent and Negligent Misrepresentation and/or Omission Claims

Plaintiffs allege that Defendants, by their deliberate and knowingly "fraudulent misrepresentations, omissions and concealment . . . purposely deceive[d] Plaintiffs into believing that Defendants were obtaining and furnishing adequate credit life, credit disability, property and/or collateral protection insurance for them at a fair price . . . ." Complaint ¶ 76. In order to succeed in a claim for fraudulent misrepresentation, a plaintiff must prove that: (1) defendant or his agent made a representation (2) that was false (3) and material (4) and that the person making the representation knew it to be false and (5) intended that the plaintiff act upon the representation in the manner reasonably contemplated. *See Levens v. Campbell*, 733 So. 2d 753, 761-62 (Miss. 1999). A plaintiff must also prove that (6) he was unaware that the representation was false, (7) he relied on the truth of the representation, (8) had a right to rely on the representation, and that (9) he suffered consequent and proximate injury. *See id.* A claim of negligent misrepresentation requires proof that: (1) defendant failed to

exercise reasonable care in making (2) a misrepresentation or omission of a fact that was (3) material or significant, and that plaintiff reasonably relied on the misrepresentation or omission and was (4) damaged as a result of his reasonable reliance. *See id.* at 762.

Defendants have submitted a disclosure statement signed by Hoggatt on August 25, 1999, as part of his CitiFinancial loan which stated, "CREDIT LIFE OR CREDIT DISABILITY INSURANCE IS NOT REQUIRED TO OBTAIN THIS LOAN." *See* Response, Exhibit "A." Immediately above his signature appears the following: "I/WE HAVE READ THIS NOTICE AND HAVE MADE THE CHOICE ABOVE BEFORE SIGNING ANY NOTE OR OTHER PAPER REPRESENTING A LOAN." *See id.* Hoggatt testified that he signed the August 25, 1999, contract with CitiFinancial, but did not read it. *See* Rebuttal Exhibit "4." Hoggatt also testified that he was not prevented from reading the contract, that he did not ask Mitchell any questions regarding the contract prior to signing it, and that he received a copy of the contract.

As previously stated by the Court with regard to Plaintiffs' fraudulent concealment defense, Hoggatt could not reasonably rely on a representation of Defendants contrary to the express language of the contract which he signed. *See* section "III.A.2." As both fraudulent and negligent misrepresentation claims require a finding by the Court of reasonable reliance on the alleged misrepresentation or omission, the Court therefore finds that, as a matter of law, Hoggatt cannot prevail on his claims of fraudulent or negligent misrepresentation against Mitchell.

E. Plaintiffs' Civil Conspiracy Claim

Plaintiffs allege that "Defendants entered into a civil conspiracy with each other and insurance companies to sell credit life, credit disability, property and/or collateral protection insurance to Plaintiffs that was unnecessary and at an exorbitant premium far in excess of the market rate." Complaint ¶ 90. However, the United States Court of Appeals for the Fifth Circuit has held that

> [i]t is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.

Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952). Therefore, unless "individual defendants are . . . shown to have acted outside of their employment capacities, they are incapable of conspiring with their corporate employer." *Cooper v. Drexel Chemical Co.*, 949 F. Supp. 1275, 1285 (N.D. Miss. 1996). The Court finds no evidence in the record that Mitchell acted "outside [her] employment capacities" with regard to Hoggatt's claim of civil conspiracy. The Court therefore finds that, as a matter of law, Hoggatt cannot prevail on his claim of civil conspiracy against Mitchell.

F. Plaintiffs' Negligence Claim

Plaintiffs allege that Defendants breached their "duty to . . . exercise reasonable care to ensure that Plaintiffs received credit life, credit disability, property and/or collateral protection insurance which was both adequately and fairly priced." Complaint ¶¶ 95-96. Plaintiffs allege that Defendants: failed

to obtain adequate insurance for Plaintiffs, failed to obtain insurance at the prevailing market rate, charged an excessive interest rate and related charges for the subject insurance policies, and failed to provide Plaintiffs with a signed and dated copy of their insurance policies.

Defendants argue that the duties Plaintiffs allege were breached are essentially fiduciary duties and that failure to act where there is no duty to act is not negligence. The Court agrees. Having found that no fiduciary relationship existed between Plaintiffs and Defendants, *see* section "III.B.," the Court finds that Defendants had no duty to act or not act as Plaintiffs allege. Moreover, the Court finds no evidence in the record to show that Mitchell engaged in the conduct about which Hoggatt complains, or which otherwise rises to the level of gross negligence, malice or reckless disregard for the rights of Hoggatt. The Court therefore finds that Hoggatt cannot prevail on his claim of negligence against Mitchell.

G. Plaintiffs' Claim of Unconscionability Under the UCC

Plaintiffs allege that the "conduct, acts, and omissions of the Defendants constitutes [sic] unconscionable practices, individually and collectively, under the UCC," Complaint ¶ 100, and seek both compensatory and punitive damages with regard to their unconscionability claim. Although not cited by Plaintiffs, the remedy for unconscionability under the UCC is set forth in section 75-2-302 of the Mississippi Code (providing that the court, upon a finding as a matter of law that the contract or any clause of the contract is unconscionable, refuse to enforce the contract, or enforce that part of the contract that is not unconscionable or limit the application of the unconscionable clause so as to avoid an unconscionable result). This section 75-2-302 only applies to the sale of goods, however. *See* Miss. Code Ann. § 75-2-102 (providing that "this

chapter applies to transactions in goods"). *See also Huff v. Hobgood*, 549 So. 2d 951, 953 (Miss. 1989) ("When one contracts for the sale of goods . . . , the transaction is governed by the UCC as adopted in Miss. Code Ann. §§ 75-2-101 to – 725").

Goods are defined by the UCC as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale . . . ." Miss. Code Ann. § 75-2-105(1). The Court questions whether an insurance policy fits within the definition of "goods." Plaintiffs have not referred the Court to authority supporting their contention that the sale of insurance is a transaction in goods governed by the UCC. To the contrary, most courts have held that an insurance policy is not goods as defined by the UCC. *See Bartley v. National Union Fire Ins. Co.*, 824 F. Supp. 624, 636 (N.D. Tex. 1992) (finding that insurance contracts do not fit within the definition of goods promulgated by the Uniform Commercial Code); *Elrad v. United Life & Acc. Ins. Co.*, 624 F. Supp. 742, 744 (N.D. Ill. 1985) (finding that, under the definition of "goods" adopted by Illinois, which is identical to the definition found at Miss. Code Ann. § 75-2-105(1), life insurance contracts were not "goods" within the scope of the Uniform Commercial Code); *Oxford Lumber Co. v. Lumbermens Mutual Ins. Co.*, 472 So. 2d 973, 978 (Ala. 1985) (finding that the issuance of an insurance contract is a service, and not a product subject to the sales of goods provisions under the Uniform Commercial Code). *Compare Johnson Enter. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1314 (11th Cir. 1998) (finding the UCC inapplicable to a contract for the sale of services).

The Court therefore finds that the subject insurance contracts are not goods as defined by section 75-2-105 of the Mississippi Code. Accordingly, the Court finds that, as a matter

of law, Hoggatt cannot prevail on his claim of unconscionability under the UCC against Mitchell.

IV. Conclusion

Having found that Hoggatt cannot prevail on any of his claims against Mitchell, and having previously found that Plaintiffs cannot prevail on any of their claims against Farmer or Stevens, the Court finds that the individual Defendants were fraudulently joined as defendants in this action.[9] As all of the non-diverse Defendants in this case were fraudulently joined, their citizenship will not be considered for the purpose of diversity of citizenship jurisdiction analysis under 28 U.S.C. § 1332. Therefore, as the statutory requisites for diversity of citizenship jurisdiction are satisfied, the Court finds that it has federal subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332.

IT IS THEREFORE ORDERED that the Motion of Plaintiffs to Remand [6-1] is hereby denied.

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9. Having found that the individual Defendants were fraudulently joined as defendants in this action, the Court need not consider whether they were misjoined under Miss. R. Civ. P. 20 and 82(c).

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-60608

SUSIE ROSS; DENITA JOHNSON; JAMES CURTIS; LARRY PICKENS; DORIS KING; KAREN WHITLEY; RUBY MAGEE; ROY ALLEN, JR.; CHESTER NEWMAN; SHARON WHITE,

Plaintiffs-Appellants,

v.

CITIFINANCIAL, INC., A MARYLAND CORPORATION, FORMERLY KNOWN AS FIRST FAMILY FINANCIAL SERVICES, INC.; CITIFINANCIAL, INC., A MARYLAND CORPORATION, FORMERLY KNOWN AS COMMERCIAL CREDIT OF MISSISSIPPI; CITIFINANCIAL, INC., A TENNESSEE CORPORATION, FORMERLY KNOWN AS FIRST FAMILY FINANCIAL SERVICES, INC.; CITIFINANCIAL, INC., A TENNESSEE CORPORATION, FORMERLY KNOWN AS COMMERCIAL CREDIT OF MISSISSIPPI; CITIFINANCIAL SERVICES, INC., A GEORGIA CORPORATION; UNION SECURITY LIFE INSURANCE COMPANY; AMERICAN SECURITY INSURANCE COMPANY; TRACY MITCHELL; DARLA FARMER; JOE SMITH,

Defendants-Appellees.

No. 02-60609

DENISE HOWARD; LENA CHAMBERS; PRISCILLA CHALMERS; BETTY WHITLEY; FAYE DENISE LOGAN; CAROL BUSECK; KELVIN JOHNSON; PHILLIP GORDON; DEBBIE GORDON; ALISHA F. WILSON; MARGARET HAYMON; WANDA ALLEN; MONROE HOGGATT; EUGENE HAYMON; EVA PARKER HALL,
Plaintiffs-Appellants,

v.

CITIFINANCIAL, INC., A MARYLAND CORPORATION, FORMERLY KNOWN AS FIRST FAMILY FINANCIAL SERVICES, INC.; CITIFINANCIAL, INC., A MARYLAND CORPORATION, FORMERLY KNOWN AS COMMERCIAL CREDIT OF MISSISSIPPI; CITIFINANCIAL, INC., A TENNESSEE CORPORATION, FORMERLY KNOWN AS FIRST FAMILY FINANCIAL SERVICES, INC.; CITIFINANCIAL, INC., A TENNESSEE CORPORATION, FORMERLY KNOWN AS COMMERCIAL CREDIT OF MISSISSIPPI; CITIFINANCIAL SERVICES, INC., A GEORGIA CORPORATION; UNION SECURITY LIFE INSURANCE COMPANY; AMERICAN SECURITY INSURANCE COMPANY; TRACY MITCHELL; DARLA FARMER; JOE SMITH; JOHN DOES 1-50; VALERIE STEVENS,
Defendants-Appellees.

January 25, 2004

Appeals from the United States District Court for the Southern District of Mississippi, Jackson

ON PETITION FOR REHEARING EN BANC

(Opinion 8/29/03, 5th Cir. _____ F.3d _____)

Before SMITH, WIENER, and BARKSDALE,
Circuit Judges.

PER CURIAM

(✔) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Rhesa Hawkins Barksdale
United States Circuit Judge

* Judges King and Clement did not participate in the consideration of the rehearing en banc.